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POSSESSION AS A ROOT OF TITLE

In these days when nearly every transaction connected with land is committed to writing there is a tendency to overlook the importance attached by the law to mere possession, but nevertheless possession still remains a root of title. In very early days, no doubt, possession was practically the only title to land: he was the owner who, with his retainers, was strong enough to take, and then to retain, possession. And in the more civilized of ancient communities land was transferred from one person to another by physical possession being given in the presence of witnesses. A record of what was done might be drawn up and signed, as in the case of livery of seisin, but the writing did not constitute the title to the land; it was merely evidence in support of the title.

If a person today enters upon and takes possession of a parcel of land, without any title or even color of title thereto, but merely as a wrongdoer, what is his position in the eyes of the law? At first no doubt he is a mere trespasser, and could be evicted by the true owner, or by any person, not being the true owner, who was in possession of the land. But this latter person may himself have originally been a mere trespasser. This raises the question, At what point of time does the original taking of possession by a stranger to the title cease to be regarded as a mere trespass, and evolve into the "possession" that is so respected by the law? The answer appears to be, When he has remained for some time in peaceable possession of the land, exercising with respect to it the ordinary rights of an occupier.

In *Doe d. Hughes v. Dyeball*¹ the plaintiff in ejectment proved a lease to himself and a year's possession, and rested his case there. The defendant, who had forcibly taken possession, objected that no title was proved in the demising parties to the lease. Lord Tenterten, C. J., said, "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must show your title."

¹ Moody and Malkin's Reports, 346 (1829).

The failure on the part of the plaintiff to prove that his lessors had title obviously made the lease worthless as evidence of the plaintiff's title, and the plaintiff succeeded on the other evidence adduced by him, *viz.*, that he had had a year's possession. Thus the case shows that possession in the plaintiff and nothing more is sufficient to enable him to maintain ejectment against a stranger.

In *Asher v. Whitlock*,² Cockburn, C. J., referring to the above mentioned case, said: "In *Doe v. Dyeball* one year's possession by the plaintiff was held good against a person who came and turned him out, and there are other authorities to the same effect," thus putting that case upon possession alone.

Perhaps the most emphatic way in which the law shows its respect for possession is by its rule that "the fact of possession is *prima facie* evidence of seisin in fee."³

"The wrongful seisin acquired by a disseissor gave him a real, though wrongful, estate, a 'tortious fee simple' valid as against everyone but the person truly entitled, and capable of being made right and perfect by a release from that person to the person in actual seisin."⁴ This is very instructive. The law insisted on livery of seisin, but when once a person had been put in possession by this means he was capable of taking a release by deed of an estate in remainder. Here we see that the real owner could perfect the title of a disseissor by giving him a release, no livery of seisin being necessary.

The necessity of possession as a root of title explains the rule of common law which prevented a person from conveying to himself. "The ancient Common Law essayed to wield the land itself,—'the most ponderous and immovable of all the elements.' Hence all its rules and forms regarded real property as more or less identified with actual possession. The single consideration that *livery* was the primitive mode of conveyance, for which other forms were but substitutes, and that a man could not deliver seisin to himself, explains many otherwise inexplicable doctrines."⁵

² Law Reports, 1 Queens Bench 5 (1865).

³ Per Mellor, J., in *Asher v. Whitlock*, 6; See also Newell on Ejectment (1892),

433.

⁴ Pollock and Wright on Possession, 94, citing Co. Litt., §473.

⁵ Hayes' Elementary View of Uses, 80 (1840).

A person occupying land without any title has a devisable interest therein, and if he settles it by his will for successive estates those estates take effect as against a person who enters upon the land, and ejectment may be maintained accordingly.⁶ And the interest of a mere possessor may also be inherited or conveyed. Moreover if the land be taken compulsorily he is entitled to compensation.⁷

In the last cited case, the decision in *Doe d. Mary Carter v. Barnard*⁸ was disapproved of as being inconsistent with *Asher v. Whitlock*, already cited, and with the views of Mr. Preston, Mr. Joshua Williams, Professor Maitland and Mr. Justice Holmes. The reporter adds a reference to an article by Professor J. B. Ames in the Harvard Law Review.⁹ In the above cited case of *Doe v. Barnard* the plaintiff in ejectment, though having had thirteen years' possession, failed in her action against a defendant (who had turned her out), on the ground that her own case showed possession, and therefore a presumed fee simple, in her late husband, and showed also that her husband left an heir. The plaintiff's possession was not connected with her husband's, and the defendant was allowed to set up the title of the heir in answer to the plaintiff's claim. As above shown the case has been disapproved of.

If A, having no title, should acquire possession and hold it *animo dominendi* for say one year and then mortgage the property to B and remain in possession paying the interest, and then C, a stranger, acquired and held possession for less than 20 years, also *animo dominendi*, it would appear that B, the mortgagee, (although neither he nor the mortgagor had obtained a title under the Statutes of Limitation) could eject C, since B would claim under the earlier possession. A's possession would be *prima facie* evidence of his seisin in fee; would be capable of conveyance to his mortgagee, and the mortgagor's possession would be attributed to the mortgagee.¹⁰ (The mortgagee, in the case above put, would,

⁶ *Asher v. Whitlock*, *supra*.

⁷ *Perry v. Clissold* (1907) Law Reports, Appeal Cases 73.

⁸ 13 Queen's Bench 945 (1849).

⁹ Vol. 3, p. 324, n.

¹⁰ *Cole on Ejectment* 462, 479 (1857).

of course, not be claiming adversely to the mortgagor.) A title would therefore be set up good as against all persons except the true owner proving right to immediate possession. Or if, in the simpler case, without there being any mortgage, A held peaceable possession for one year, and went out of possession, *animo reverendi*, and C took possession and held it for any period less than required by the Statutes of Limitation A could in like manner eject him in reliance on his (A's) earlier possession and presumed fee simple.

The case first put of there being a mortgage is exemplified by "*Doe on the several demises of Smith and Payne v. Webber*".¹¹ The plaintiff Payne had been in possession for a number of years, though no statutory title was relied on. Then he mortgaged the property to the plaintiff Smith, but remained in possession, paying the interest on the mortgage. After the date of the mortgage the defendant brought ejectment under some claim of title against the plaintiff Payne (who was still in possession) and the cause was submitted to arbitration, which went in favor of the defendant, who thereupon went into possession under a writ of *habere facias possessionem* and remained in possession for about six years before the the action was brought. The defendant set up the award as against the plaintiff Smith, who was proved to have been present at the arbitration proceedings, but not to have taken any part in them. The evidence was ruled out as being *res inter alios acta*, and the plaintiff Smith obtained the verdict. All that the case decides is that the evidence was rightly rejected.

It would be interesting to know what direction was given by the trial judge to the jury, but it is not reported. The verdict seems, however, to have been right. The plaintiff Smith was deemed to be in possession by reason of his mortgagor's continued possession and payment of interest, and the defendant had not acquired a statutory title.

The effect of the case is thus given in Pollock and Wright on Possession: "Ten years' possession has been decisive even against several years' subsequent possession under color of title."¹²

¹¹ 1 Adolphus and Ellis 119 (1834); 3 Law Journal, King's Bench, 148; 3 Nevile and Manning 746.

¹² P. 96

As exemplifying at once the risks attending *nisi prius* practice and the necessity of some system of registration of title or of deeds, it appears that the defendant went to trial in ignorance of Smith's title, and had trained the evidence concerning the award against the plaintiff Payne. Then, discovering the mortgage, the defendant sought to deflect this evidence against the mortgagee, which was not allowed. The two plaintiffs appeared to have been working together in the action, and it was complained by the defendant's counsel that Payne was going behind the award by way of using Smith's name as a second plaintiff.

The minor, though none the less important, question of the costs of the evidence concerning the award was later dealt with,¹³ when the defendant was allowed such costs as against Payne, as costs of the issue found in favor of the defendant as against Payne, who, of course, could not succeed in face of the award.

The doctrine that possession is a root of title exists independently of the Statutes of Limitation. It is true that the judges, when speaking of a title by possession short of a statutory title, generally go on to say that the title is one that may ripen into an absolute title, but it seems clear that a possessory title would be recognized by the courts if there were no Statutes of Limitation. It would follow therefore, in a case where no Statute of Limitation operated, that so long as a mere possessor was left in undisturbed possession by the true owner and those rightfully claiming under him, he, the possessor, would have a title recognized by the courts, and one that would descend to his heirs or could become the subject of conveyance or devise, and would be good as against all the world except the true owner for the time being.

In conclusion it may be pointed out that where there have been several successive possessions by strangers to the title, the last possessor can take advantage of the prior possessions only if all the possessions have been continuous, and are connected as of right.

T. F. Martin.

Wellington, New Zealand, August, 1913.

¹³ 2 Adolphus and Ellis 448.